

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JOHN ROSKY,

Petitioner,

vs.

WARDEN NEVEN,

Respondent.

Case No. 2:13-cv-01707-JCM-PAL

ORDER

The court directed petition to file an amended petition for a writ of habeas corpus and to show cause why the court should not dismiss this action because he has failed to exhaust his available state-court remedies. Order (#8). See also 28 U.S.C. § 2254(b). Petitioner has done both. The court is not persuaded by his showing of cause, and the court dismisses this action.

As in the original petition, petitioner claims that the Nevada Supreme Court's reversal of the judgment of conviction for sexual assault operated as an acquittal, and that the subsequent retrial violated the Double Jeopardy Clause of the Fifth Amendment. Although petitioner had pursued a direct appeal from the retrial and then a state post-conviction habeas corpus petition, he did not present the double-jeopardy claim to the state courts. Petitioner argues that he tried to convince the attorney who represented him in the state habeas corpus proceedings to present the double-jeopardy claim, but she declined. This argument confirms that the claim is not exhausted. Petitioner also argues that it is difficult to file a second or successive habeas corpus petition in the state courts. See Nev. Rev. Stat. § 34.810. However, petitioner can overcome that procedural bar by a showing of cause and prejudice to the state courts, and this court will not speculate how the state courts would

1 rule. Petitioner will need to present this claim to the state courts before he can proceed with the
2 claim in this court.

3 The court makes no statement on the timeliness of any subsequent federal habeas corpus
4 petition filed in this court.

5 Reasonable jurists would not disagree with this court's ruling, and the court will not issue a
6 certificate of appealability.

7 IT IS THEREFORE ORDERED that this action is **DISMISSED** without prejudice for
8 petitioner's failure to exhaust his available state-court remedies. The clerk of the court shall enter
9 judgment accordingly.

10 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

11 DATED: October 2, 2014.

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14 JAMES C. MAHAN
15 United States District Judge
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